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IN THE

Supreme Court of the United States

October Term, 1974

No. 75-312

COLEMAN A. YOUNG, Mayor of the City of Detroit, et al.,
Petitioners,

v

AMERICAN MINI THEATRES, INC., a Michigan corporation, and PUSSY CAT THEATRES OF MICHIGAN, INC., a Michigan corporation,
Respondents.

— — —

COLEMAN A. YOUNG, Mayor of the City of Detroit, et al.,
Petitioners,

v

NORTOWN THEATRE, INC.,
Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT NORTOWN THEATRE, INC.

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OPINIONS BELOW

The opinion of the Court of Appeals (App A, pp 15-39) is not reported. The opinion of the District Court (App. D, pp 43-60) is reported at 373 F Supp 363.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit (App. B, pp 40-41) was entered on June 16, 1975. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED

1. Whether Section 32.0007 Of The Official Zoning Ordinance Of The City Of Detroit (Ord. 742-G) And Section 5-2-1.2 Of The Detroit Municipal Code (Ord. 743-G) Are, As Written And/Or As Applied, Void For Vagueness And/Or Overbreadth?

2. Whether Ordinance Nos. 742-G And 743-G Of The Ordinances Of The City of Detroit Are Unconstitutional As Written And/Or Applied In That Same Fail To Meet The Requisites Of Procedural Due Process And Constitute An Unlawful Prior Restraint Upon The Exercise Of Respondent's Rights Under The First And Fourteenth Amendments To The Constitution Of The United States?

3. Whether Ordinance Nos. 742-G And 743-G Of The Ordinances Of The City Of Detroit, As Same Purport To Regulate The Establishment Of "Adult" Businesses In The City Of Detroit, Are Violative Of The First Amendment To The Constitution Of The United States And Repugnant To The Equal Protection Clause Of The Fourteenth Amendment, As Written And/Or As Applied, In That, By Their Terms, The Statutory Classification Is Grounded Upon The Content Of The Materials And Further, Said Statutory Classification Is

Not Rationally Related To A Valid Public Purpose Nor Necessary To The Achievement Of A Compelling State Interest?

4. Whether Ordinance Nos. 742-G And 743-G, Of The Ordinances Of The City Of Detroit, Insofar As Same Purport To Regulate The Establishment of Motion Picture Theatres In The City of Detroit, Are Repugnant To The First And Fourteenth Amendments To The United States Constitution In That Same, By Their Terms, Place A Forbidden Burden Upon The Exercise Of The Right Of Free Speech In That Said Ordinances Regulate Expression Absent Any Valid And/Or Recognizable Compelling State Interest And/Or If There Exists A Compelling State Interest Which Is Legitimate And Substantial In Regulating Motion Picture Theatres In The City Of Detroit, Whether Same Are Void For Impermissible Overbreadth By Employing Means Which Sweep Unnecessarily Broadly And Thereby Invade The Area Of Protected Freedoms?

5. Whether Section 5-2-1.2 Of The Code Of The City Of Detroit, As Same Pertains To The Issuance Of A License To Operate An "Adult" Motion Picture Theatre, Is Repugnant To The First, Fourth, Fifth And Fourteenth Amendments To The Constitution Of the United States As Written And/Or Applied In That The Standards Enumerated Therein Are Vague And Ambiguous And Thus Totally Incapable Of Objective Measurement, Thereby Vesting The Mayor Of The City Of Detroit With Virtually Unlimited Discretionary Power To Grant Or Refuse A License, And Effectively Imposes A Prior Restraint Upon The Exercise Of First Amendment Rights?

CONSTITIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

Constitution of the United States

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

" . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws. . . ."

STATEMENT OF THE CASE

On November 2, 1972, the City of Detroit enacted Ordinance No. 742-G (App G, p 65) by amending the official Zoning Ordinance of the City of Detroit, and Ordinance No. 743-G (App H, p 80) amending the Municipal Code of the City of Detroit.

On the 21st day of December, 1972, responded obtained a general theatre license to operate a motion picture thea-

tre at 7706 E. Seven Mile Road, Detroit, Michigan. As a condition of the issuance of said license, the theatre building was required to meet all of the health, safety and building standards specified by the City of Detroit.

On the 1st day of March, 1973, respondent Nortown Theatre, Inc. commenced operating the premises as a motion picture theatre. The premises had been in existence and had been operated as a motion picture theatre since 1938 and had commonly been known in the City of Detroit as the Nortown Theatre for over 30 years and during that time had continuously exhibited motion picture films to the public on the premises.

On the 7th day of March, 1973, the Office of the Corporation Counsel for the City of Detroit notified respondent by letter, that it had come to the attention of the Corporation Counsel's Office that the Nortown Theatre had adopted a policy of exhibiting so-called "adult" films without first complying with Ordinances 742-G and 743-G. Respondent was also notified that any business which operates in violation of a municipal zoning ordinance is, by state law, a nuisance *per se,* which may be enjoined by court order, and unless respondent complied with the said zoning and licensing regulations forthwith, the City of Detroit would begin legal proceedings to enjoin the operation of the Nortown Theatre as an adult motion picture theatre.

Following such notification, the respondent, Nortown Theatre, Inc. claimed its constitutional rights under the First, Fifth, and Fourteenth Amendments were threatened by the proposed action of the various City officials, and on March 14, 1973, sought declaratory and injunctive relief in the Federal District Court, Eastern District of Michigan, under 42 USC 1983. The jurisdiction of the

Court was invoked under 28 USC 1331 and 28 USC 1343(3).

This case was consolidated for argument with another cause of action instituted in the same District Court entitled, *American Mini Theatres, Inc., et al. v Roman Gribbs, et al.,* Civil Action #40198.

On the 22nd day of March, 1974, Judges Lawrence Gubow and Cornelia G. Kennedy issued a joint Opinion upholding the constitutionality of the ordinances in part and ruling said ordinances invalid and unconstitutional in part. (App D, pp 43-60). On the 25th day of April, 1974, an Order was signed by the Honorable Lawrence Gubow in conformance with the decision (App E, pp 61-62).

A Notice of Appeal was filed by the plaintiff Nortown Theatre, Inc., respondent herein on the 20th day of May, 1974. No appeal was taken by defendants, petitioners herein.

On June 16, 1975, the Sixth Circuit Court of Appeals issued a decision striking down the ordinances as violative of the Free Speech and Press provisions of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. (App A, pp 15-39). Judgment was entered the same day. (App B, p 40).

On July 18, 1975, a Stay of Mandate was issued by the Hons. Edwards, Celebrezze and Lively, the panel which decided the case in the Court of Appeals. (App C, p 42).

A Petititon for Certiorari was filed with the United States Supreme Court on August 28, 1975, and Certiorari was granted on October 20, 1975.

SUMMARY OF ARGUMENT

Whatever the label the state places upon legislation, where a regulation infringes upon fundamental rights, it must meet certain constitutional requisites in order to be held valid. These requisites are no less applicable to municipal zoning ordinances where, under the guise of economic and social legislation, fundamental rights are impinged. Unlike the circumstance in *Village of Belle Terre v Boraas,* 416 US 1 (1974), the zoning ordinances in question are aimed directly at a fundamental constitutional right. Freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive and the right to read. *Griswold v Connecticut,* 381 US 479 (1965), at pp 482-483.

If, "the state may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge," *Griswold v Connecticut, supra,* it may not, by means of a zoning ordinance, restrict the right to distribute and the right to receive by restricting the means by which books, magazines or films are distributed to, and received by, the public, particularly where, as here, a theatre or bookstore bears a necessary relationship to that aspect of free speech and press. *Schneider v State,* 308 US 147 (1939).

The ordinances in question place a selective burden upon "adult" bookstores and theatres. Because Detroit treats some bookstores and theatres differently than others and does so by classification formulated in terms of the subject matter or content of the press materials intended to be sold or exhibited by the theatre or bookstore, the ordinances must be analyzed in terms of the equal protection clause of the Fourteenth Amendment, which mandates that a

classification promulgated by a state or municipality be reasonable and rest upon some ground of difference having a fair and substantial relationship to the object of the legislation. The crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment. *Police Department of the City of Chicago v Mosely,* 408 US 92 (1972) at p 95; *Reed v Reed,* 404 US 71 (1971) at pp 75-77.

Petitioners assert that the zoning ordinances are aimed at the conduct of the business, not the press materials which the business intends to disseminate, and premise their argument on the test enunciated by this Court in *United States v O'Brien,* 391 US 367 (1968). However, the ordinances themselves emphasize the word "adult", and that is defined on the basis of the content of the materials intended to be disseminated on the premises. Thus, these zoning regulations cannot be justified as a regulation of conduct where the "conduct" is the expression itself.

United States v O'Brien, supra, at p 382;
Cohen v California, 403 US 15 (1971) at pp 18-19.

Where, as here, the government, acting as a censor undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. *Erznoznik v City of Jacksonville,* 422 US 205 (1975) at p 209.

Since the ordinances affect a fundamental right, they are unconstitutional unless the state can demonstrate that these ordinances are necessary to promote a compelling governmental interest, and further, that the regulatory scheme chosen is the least drastic among reasonable ways to achieve its objectives. *Dunn v Blumenstein,* 405 US 330 (1972); *Eisenstadt v Baird,* 405 US 438 (1972); *Shelton v Tucker,*

364 US 479 (1960); *Police Department of the City of Chicago v Mosely, supra* at p 102, Note #8; *Village of Belle Terre v Boraas, supra,* dissenting opinion, Justice Marshall, p 18.

Petitioners maintain that bookstores and theatres intending to sell or exhibit "adult" press materials may be prohibited from certain areas of the City even though the press materials are fully entitled to the protection of the First Amendment, and justify this contention on the grounds that the City of Detroit has a valid interest in protecting and preserving the residential areas of the City and the business districts which serve them. Upon closer examination however, the rationale asserted by petitioners amounts to no more than ". . . An undifferented fear or apprehension . . ." which this Court has ruled was ". . . not enough to overcome the right to freedom of expression." *Police Department of the City of Chicago v Mosely, supra,* at p 101; *Cohen v California, supra,* at p 23. The city's basic premise, upon which these ordinances are grounded, would support restrictions upon virtually any kind of press material of a controversial nature. Such considerations cannot, under the First Amendment, justify the sweeping effect of these ordinances.

The effect of the ordinances is to prevent the establishment of new bookstores and theatres selling or exhibiting materials which are presumptively protected by the First Amendment and to deter existing theatres and bookstores from offering for sale or exhibition press materials which have never been found to be obscene by a prior judicial adversary hearing on that issue, *Marcus v Search Warrant,* 367 US 717 (1961); *A Quantity of Books v Kansas,* 378 US 205 (1964); and therefore are entitled to the full protections of the First Amendment. The City of Detroit is in effect, using the sledgehammer in an area which this Court has

said requires the most sensitive of tools, *Speiser v Randall,* 357 US 513 (1958). The ordinances operate to suppress, on the basis of past experience, i.e., established bookstores and theatres of an assumed "similar" nature, the distribution of press materials presumptively protected by the First Amendment and is thus a classic example of a prior restraint. *Near v Minnesota,* 283 US 697 (1931); *Organization for a Better Austin v Keefe,* 402 US 415 (1971). A community may not, consistent with the First Amendment, wall itself off from speech which, directly or indirectly, is presumed to be offensive to that community. See *Organization for a Better Austin v Keefe, supra,* at pp 418-420.

Each of the additional problems mentioned in Petitioners' Brief and supporting affidavits, i.e., increase in street crimes, prostitution and dope peddling, illegal parking, obscene materials in the possession of children, can be regulated by criminal statutes and ordinances already in force. Indeed, these ordinances are designed to obviate the necessity of resorting to the criminal law.

We are thus left with an ordinance which classifies those motion picture theatres and bookstores which fall within its regulatory purview and those which do not on the basis of the content of the press materials intended to be sold and/or exhibited. "The operative distinction is . . ." the image on the screen. "But above all else, the First Amendment means that government has no power to restrict expression, because of its message, its ideas, its subject matter or its content." *Police Department of the City of Chicago v Mosely, supra.*

The classification itself is so vague and idefinite that it fails to give fair warning as to what is prohibited in that the bookstore or theatre operator is given no notice as to the regulatory scope of the provisions in question.

Even stricter standards of precision and clarity are required where a regulation is capable of reaching expression protected by the First Amendment. *Grayned v City of Rockford,* 408 US 104 (1972); *Smith v California,* 361 US 147 (1959). This same standard of precision and clarity is applicable where the regulation of expression is one of classification rather than prohibition. *Interstate Circuit v Dallas,* 390 US 176 (1968).

As a zoning regulation, Ordinance No. 742-G would apply to every existing bookstore and theatre in Detroit as well as any proposed bookstore or theatre. It would apply to a bookstore or theatre attempting to establish itself in a certain area of the city, a theatre or bookstore desiring to move down the street, one wanting to move next door, one wishing to expand, and all existing bookstores or theatres intending to offer for sale or exhibition "adult" press materials, as defined in the ordinances.

However, there is no way of determining at what point and in what context, the ordinances at issue are triggered, for there is no way of determining with any degree of accuracy or precision, at what point—both in the context of the press materials offered for sale or exhibition and in the context of the amount and/or length of time, quantitatively, the press materials are offered for sale and/or exhibition—a bookstore or theatre qualifies as "adult." Absent any definitional standards, the theatre or bookstore operator is forced to act at his peril. Since he cannot determine at what point and in what context his bookstore or theatre becomes "adult" he must, of necessity, steer far wider of the forbidden zone. In such a circumstance, he may choose the inane or innocuous rather than run the risk of criminal or civil sanction. *Interstate Circuit v Dallas, supra.*

If "precision of regulation must be the touchstone" whenever a regulation touches upon First Amendment rights, *Interstate Circuit v Dallas, supra; N.A.A.C.P. v Button,* 371 US 415 (1963), the ordinances in question fall far short of the requisite specificity necessary to sustain their validity.

The regulations also sweep within their ambit, protected expression, and are therefore void for overbreadth. *Grayned v City of Rockford, supra,* at p 115.

Books, magazines and motion picture films are a form of exprssion protected by the First Amendment to the Constitution of the United States. *Erznoznik v City of Jacksonville,* 422 US 205 (1975); *Kaplan v California,* 413 US 115 (1973). As such, they are not subject to regulation, where that regulation is grounde pon the substantive message conveyed—in the context of their sexual content—until found to be obscene. *Miller v California,* 413 US 15 (1973); *Roth v United States,* 354 US 476 (1957). In *Miller v California, supra,* the Supreme Court specified the test to be applied in judging whether a particular work was obscene. Clearly, the ordinances at issue define "adult" in terms far more restrictive than the *Miller* formulation.

Petitioners concede that the ordinances in question sweep far beyond the permissible restraints on obscenity and thus, apply to press materials that are protected by the First Amendment. Nevertheless, petitioners justify this on the grounds that the City of Detroit has a valid interest in protecting and preserving the residential areas of the city and the business districts which serve them, and therefore may regulate and restrict the influx of "adult" businesses because of the alleged "adverse effects" caused by the operation of the business dealing in "adult" materials. As has been said, this amounts to no more than an ". . . un-

differentiated fear or apprehension . . ." *Cohen v California, supra,* at p 21; *Police Department of the City of Chicago* v *Mosely, supra,* at p 101, which the Court has held to be insufficient to overcome the right to freedom of expression.

The city may not, in the name of preserving neighborhood stability, avoiding blight and decay, and providing a suitable atmosphere for family living, shut off discourse, though disquieting and even offensive. *Organization for a Better Austin v Keefe, supra.*

The form of expression in the case at bar, as defined by the ordinances, is not subject to regulation. The ordinances can be justified, if at all, only as a valid regulation of the manner in which freedom of speech is exercised, not as a permissible restriction on the substantive message intended to be conveyed. *Cohen v California, supra,* at pp 19-24. However, the zoning ordinance itself describes that which is subject to regulation not in terms of time, place and manner, but in terms of subject matter.

The operation and effect of the ordinance is clear; they are aimed at the restriction and suppression of free expression, the effect of which is the essence of censorship.

In addition, the ordinances create and establish a procedure which fails to meet any of the requisites of procedural due process and thus constitutes an unlawful prior restraint.

Section 66.0000 of Ordinance No. 742-G of the Official Zoning Ordinance of the City of Detroit prohibits the establishment of a business defined as a "regulated use" where there are two existing businesses defined as "regulated uses" within 1,000 feet of the location of the proposed business. This prohibition may be waived by an admini-

strative agency, the City Plan Commission, if certain findings are made by that agency. Those businesses defined as "regulated uses" include "adult" bookstores and theatres, as defined in the ordinances.

Not all prior restraints are unconstitutional *per se. Southeastern Promotions, Ltd v Conrad,* 420 US 546 (1975). However, any system of prior restraint comes to the court bearing a heavy presumption against its constitutional validity. *Bantam Books v Sullivan,* 372 US 58 (1963) ". . . a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards. *First,* the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second,* any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third,* a prompt final judicial determination must be assured." *Southeastern Promotions, Ltd v Conrad, supra,* at p 560.

These criteria are applicable to the case at bar, for the ordinances give to public officials the power to deny use of a forum in advance of actual expression. *Southeastern Promotions, Ltd. v Conrad, supra,* at p 553. Indeed, all the elements of prior restraint which the Supreme Court identified and enumerated in *Southeastern Promotions, Ltd. v Conarad, supra,* at p 554, are present in the system chosen by the City of Detroit, through an administrative agency, to regulate the establishment and use of motion picture theatres and bookstores, for "One seeking to use a theatre . . . [to exhibit 'adult' films] . . . was required to apply to the . . . [City Plan Commission] . . . The . . . [City Plan Commission] . . . was empowered to determine whether the applicant should be granted permission—in effect a license or permit—on the basis of its review of the content of the . . . [press materials proposed to be

exhibited on the premises] . . . Approval of the applicant depended upon the . . . [City Plan Commission's] . . . affirmative action. Approval was not a matter of routine; instead, it involved the 'appraisal' of facts, the exercise of judgment, and the formation of an opinion by the [City Plan Commission]. . . ."

Turning to the ordinances in question, the burden of going forward is placed upon the applicant at every step of the administrative procedure. If the agency rules adverse to the applicant, he may seek relief in court. However, the burden is substantially greater and judicial review is limited to the question of whether or not the administrative agency acted arbitrarily or abused its discretion. Michigan Constitution (1963) Art. VI § 28; *Indian Village Manor Co. v Detroit,* 5 Mich App 679 (1967); *Mazo v City of Detroit,* 9 Mich App 354 (1968).

Additionally, the guidelines to be applied by the administrative agency are so vague and ambiguous that the available judicial review is, in effect, meaningless. *Interstate Circuit v Dallas, supra,* at pp 684-85. Nor is there a time limit within which the administrative agency must issue a ruling.

The delay and uncertainty inherent in the procedural process created by the ordinances in question would have the effect of discouraging a theatre or bookstore operator from offering for sale or exhibition press materials of an alleged "adult" nature on the premises. The City of Detroit, ". . . [can] . . . not escape the obligation to afford appropriate procedural safeguards." The provisions do not "assure prompt judicial review with a minimal restriction of First Amendment rights necessary under the circumstances," *Southeastern Promotions, Ltd v Conrad, supra,* and as such, is an unconstitutional prior restraint upon

respondent's rights under the First and Fourteenth Amendments to the Constitution of the United States.

Contrary to Petitioners' assertion, the effect of these zoning ordinances on free speech and press is not incidental but is immediate, direct and stifling.

The zoning ordinance would apply to a threatre or bookstore intending to sell or exhibit "adult" material which wishes to open in a certain area of the city. They would also apply to an existing theatre or bookstore which wishes to relocate down the street, or one desiring to expand next door. Indeed, as the "use" is defined in terms of the content of the press materials, they would apply to an existing theatre or bookstore which wishes to exhibit or sell press materials defined as "adult"—the factual circumstance now before the Court regarding the Nortown Theatre.

The theatre or bookstore operator is required to state his future intent. However, it would be virtually impossible for him to know in advance what books will be printed or what films will be produced and indeed, what kind of press materials will be made available to him. He is therefore faced with a Hobson's choice. He either limits himself to the innocuous and non-controversial, or, in order to give himself the widest possible latitude in offering press materials to the public, and rather than run the risk of finding himself in the position of running afoul of criminal or civil sanction, or both, he may feel compelled to comply with the ordinances in question. His option is then to act as his own censor or to subject himself to regulations which are inherently vague and a procedure which is fraught with delay and uncertainty. The precarious position of the bookstore or theatre operator becomes even more evident when one considers the nature of the threat of criminal and/or civil sanction.

The official Zoning Ordinance of the City of Detroit specifies that a violation of same shall subject the violator, upon conviction to a fine of not more than $500.00 or to imprisonment for no more than 90 days and further specifies that each day that a violation continues shall constitute a separate offense. (Section 69.0000.)

In addition, the applicable statutes of the State of Michigan permit a building, upon a finding that the use to which it is put is in violation of a municipal zoning ordinance, to de deemed a nuisance *per se* and to be abated forthwith. (M.C.L.A., §125.578.)

The only question before a court in either a criminal or civil proceedings is whether the "use" is "adult" as that term is defined by the zoning ordinance in question. As such, absolute criminal and/or civil responsibility is imposed by operation of these ordinances, for the question is not whether the theatre or bookstore operator *knowingly* operated an adult bookstore or theatre but merely whether he did, in fact, operate an "adult" bookstore or theatre.

The potential threat imposed by the strict or absolute responsibility features of Ordinance No. 742-G, criminally or civilly, would be too great a burden upon the exercise of free speech and press for it would have the effect of severely limiting the public's access to constitutionally protected materials. *Smith v California, supra.*

It is clear that, though labelled zoning regulations, Ordinances No. 742-G and No. 743-G are aimed directly at expression *per se,* and infringes upon fundamental personal rights. The regulations cannot be, and have not been, justified as necessary to protect a compelling and substantial governmental interest. Nor has it been demonstrated that the means chosen to accomplish the end are the least intrusive. Finally, the effect upon free speech and press

is not incidental. On the contrary, the effect of the ordinances on First Amendment rights is direct, immediate and stifling. These regulations would permit, in the name of conservation of business and residential property values, and preservation of neighborhood stability, discourse to be shut off, debate to be stilled and the most basic and most fundamental of our rights to be irrevocably weakened. They are unconstitutional abridgement of free speech and press.

ARGUMENT

I.

SECTION 32.0007 OF THE OFFICIAL ZONING ORDINANCE OF THE CITY OF DETROIT (ORD. 742-G) AND SECTION 5-2-1.2 OF THE DETROIT MUNICIPAL CODE (ORD. 743-G) ARE, AS WRITTEN AND/OR AS APPLIED, VOID FOR VAGUENESS AND/OR OVERBREADTH.

It is elementary that in the area of First Amendment freedoms, a vague statute or ordinance is repugnant to the constitutional provisions guaranteeing those freedoms.

The constitutional requirement of precision and clarity proceeds from the concept that an individual ought to be adequately warned that sanctions will attach to future conduct he might be contemplating, and that such warning may not issue in a form that men of common intelligence must necessarily guess as to its meaning and differ as to its application. *Papachristou v City of Jacksonville*, 405 US 156 (1972); *Coates v Cincinnati*, 402 US 611 (1971). See also *Conally v Gen. Constr. Co.*, 269 US 385 (1927); *Winters v New York*, 333 US 507 (1948); *Lanzetta v New Jersey*, 306 US 451, 453 (1939). Aside from the notice requirement, concern over vague criteria arises from the

fear of the potential for government abuse and uncertainty of application that is afforded. *Papachristou* v *City of Jacksonville, supra.*

Stricter standards of precision are required where a regulation is capable of reaching expression protected by the First Amendment.

Smith v Gougen, 415 US 566 (1974), at p 572-573:

> ". . . the due process doctrine of vagueness . . . incorporates notions of fair notice or warning. Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.' Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts. . . . "

In *Grayned v City of Rockford*, 408 US 104 (1972) at pp 108-9, the Supreme Court stated:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic

> policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

And the court also said, at p 109, Note #5:

> "Where First Amendment interests are affected, a precise statute 'evincing a legislative judgment that certain specific conduct be . . . proscribed,' Edwards v South Carolina, 372 US 229, 236, 9 L Ed 2d 697, 702, 83 S Ct 680 (1963), assures us that the legislature has focused on the First Amendment interests and determined the other governmental policies compel regulation . . . . "

In *Smith v California*, 361 US 147 (1959), the United States Supreme Court stated:

> "And this court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."

These same standards were applied where the regulation of expression at issue was one of classification rather than prohibition. *Interstate Circuit v Dallas*, 390 US 676 (1968). The court found that "The absence of narrowly

drawn, reasonable and definite standards for the officials to follow", invalidated the ordinance.

Turning to the definition of the terms, "adult bookstore" and "adult motion picture theatre" as set out in Petitioners' Brief, at pp 44-45, it is clear that the actual or potential bookstore or theatre operator is set adrift upon a boundless sea. An "adult" bookstore is one having, " . . . as a substantial or significant portion of its stock in trade, books, magazines and other periodicals which are distinguished or characterized by their emphasis on matter . . . " as therein defined in said ordinance, "or an establishment with a segment or section devoted to the sale or display of such material." What is meant by, " . . . a substantial or significant portion . . . "? And who is to make that determination? Does "substantial or significant" mean a certain percentage of the press materials offered for sale or does it mean a percentage of sales of the establishment? And how much and to what degree, both quantitatively and qualitatively are press materials allowed to depict or describe by word or picture the naked body before they are deemed to be " . . . distinguished or characterized by their emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas'? And who is to determine this? Must a bookstore owner read every book, view every magazine, see every movie? And if he did, what formula, what readily ascertainable standard must he apply assuming it was possible to do so? If an "adult book store" is defined additionally or alternatively as an "establishment with a segment or section devoted to the sale or display of such material", how many books and magazines—as well as what kind—constitutes a "segment or section . . . "? Has a corner drug store which keeps certain magazines separated and away from children because they deal with nudity, or, indeed.

under the counter and available to the general public upon request, established a "segment or section devoted to the sale or display of such material"? Does a book seller who —for whatever reason—separates and classifies books and magazines based upon theme or content create such a "segment or section"? Virtually every store offering books, magazines or periodicals for sale or display could potentially fall within the purview of these regulations.

The inherent vagueness of the terms are even more strikingly apparent—and the burden upon the exercise of First Amendment Rights is equally as great—when one considers the definition of an "adult motion picture theatre." It is defined as "an enclosed building . . . used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas.' ". At what point does a theatre become a "building used for presenting material . . . " of a certain content? Does this depend upon the content of the film itself or the length of time the film or films are exhibited at the theatre? Would a theatre which exhibits one film which falls within the regulatory purview of the ordinance—assuming that can be determined—for one week of the year constitute a "building used for presenting material . . . " of a certain kind? And what of a theatre that exhibits one film for ten weeks of the year or one that exhibits six films which may fall within the regulatory purview of the ordinance for two weeks per film within a year's span of time? Additionally, what would be the films which would fall within the regulatory purview of the ordinances? A film which depicts nudity—of which there are many—would arguably fall within the definitional purview of the materials sought to be regulated. The basic problem is that nothing in the ordinance defines at

what point the regulatory mechanism of the ordinance is triggered. This is compounded by the fact that as a zoning ordinance, the regulation speaks in terms of a *proposed* use, i.e., one that is not in existence but is contemplated, and therefore requires that a potential theatre or bookstore operator state his intentions as to the content of press materials he will offer for sale, display or exhibition on his premises for an indeterminant time into the future with virtually no way of knowing what will be available for sale, display or exhibition in the future, nor what qualitatively and quantitatively constitutes the press materials subject to regulation nor how much, quantitatively, he may offer for sale, display or exhibition before the premises are deemed "adult". Yet, he is required to conform his conduct to such a "norm" under threat of criminal and/or civil sanction, a norm which is virtually impossible to determine and does not exist.

In addition, should one who operates or wishes to operate an "adult" theatre or bookstore, file an application, the guidelines to be applied by the administraitve agency are inherently incapable of precision and are vague and ambiguous. Section 66.0000 of Ordinance 742-G of the Official Zoning Ordinance of the City of Detroit establishes a prohibition to an additional business defined as a "regulated use" by the ordinance where there are two existing "regulated uses" within 1,000 feet of the proposed use. Pursuant to Section 66.0101, this prohibition may be waived by the City Plan Commission if the following findings are made by that administrative body: (App G, p 68)

> "a) That the proposed use will not be contrary to the public interest or injurious to nearby properties, and that the spirit and intent of this Ordinance will be observed.

b) That the proposed use will not enlarge or encourage the development of a 'skid row' area.

c) That the establishment of an additional regulated use in the area will not be contrary to any program of neighborhood conservation nor will it interfere with any program of urban renewal.

d) That all applicable regulations of this Ordinance will be observed."

But how can one measure, with any degree of acuracy —prior to application of the standard—whether a proposed use will be, "contrary to the public interest or injurious to nearby properties?" What is the public interest referred to? In what context is it to be judged? And who is to make such a judgment and what criteria are to be applied? What "properties" is the ordinance speaking of? How far is "nearby" and what is meant to be "injurious"? "Injurious" to whom? And how can a proposed use gauge, with any degree of accuracy, whether it will "encourage the development of a 'skid row' area"? What is a skid row area? How could a use *encourage* its development? How do you determine whether a certain use to which property is put —*before* that property is put to the intended use—would, "encourage the development of . . ." a certain kind of area?

Initially, the theatre or bookstore operator is required to be his own censor. He is required to forego the exercise of his First Amendment rights lest he fall within the purview of the ordinances and thereby subject himself and his business to criminal or civil penalty.

Should the theatre or bookstore operator submit an application pursuant to the ordinance, an administrative agency is empowered to apply the requisite criteria and

thus, acts in the role as censor. At each stage the theatre or bookstore operator or the administrative body empowered to act, is required to apply criteria inherently incapable of objective determination.

The result would be no differnt than that envisioned by the court in *Interstate Circuit v Dallas, supra,* at p 684:

> "The vice of vagueness is particularly pronounced where expression is sought to be subjected to licensing. It may be unlikely that what Dallas does in respect to the licensing of motion pictures would have a significant effect upon film makers in Hollywood or Europe. But what Dallas may constitutionally do, so may other cities and States. Indeed, we are told that this ordinance is being used as a model for legislation in other localities. Thus, one who wishes to convey his ideas through that medium, which of course includes one who is interested not so much in expression as in making money, must consider whether what he proposes to film, and how he proposes to film it, is within the terms of classification schemes such as this. If he is unable to determine what the ordinance means, he runs the risk of being foreclosed, in practical effect, from a significant portion of the movie-going public. Rather than run that risk, he might choose nothing but the innocuous, perhaps save for the so-called 'adult' picture. Moreover, a local exhibitor who cannot afford to risk losing the youthful audience when a film may be of marginal interest to adults—perhaps a 'Viva Maria'—may contract to show only the totally inane. The vast wasteland that some have discribed in reference to another medium might be a verdant paradise in comparison."

If "precision of regulation must be the touchstone", whenever a regulation touches upon First Amendment rights, *Interstate Circuit v Dallas, supra; N.A.A.C.P. v Button,* 371 US 415 (1963), the ordinances in question fall far short of the requisite specificity needed to uphold their validity and as such, are void for vagueness.

On the other hand, though the definition of whether press materials are, "distinguished or characterized by an emphasis" on certain matter is vague and indefinite quantitatively and qualitatively, the definition of the nature or content of the material to which the regulation applies is definite and specific. The press materials subject to regulation are defined in terms of their sexual and/or anatomical content. And in this context, the ordinances are void for impermissible overbreadth.

"A clear and precise enactment may . . . be 'overbroad' if in its reach it prohibits constitutionally protected conduct . . . The crucial question, then, is whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." *Grayned v City of Rockford, supra,* at pp 114-115.

And in *Gooding v Wilson,* 405 US 518:

> "The constitutional guarantees of freedom of speech forbid the States from punishing the use of words or language not within 'narrowly limited classes of speech.' Chaplinsky v New Hampshire, 315 US 568, 86 L Ed 1031, 1035, 62 S Ct 766 (1942). Even as to such a class, however, because 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn, Speiser v Randall, 357 US 513, 525, 2 L Ed 2d 1460, 1472, 78 S Ct 1332 (1958), '[i]n every case the power to regulate must

> be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom,' Cantwell v Connecticut, 310 US 296, 304, 84 L Ed 1213, 1218, 60 S Ct 900, 128 ALR 1352 (1940). In other words, the statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. 'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.' "

In *Broadrick v Oklahoma,* 413 US 601 (1973), this court reviewed the overbreadth doctrine in the context of First Amendment rights, stating, at pp 612-615:

> "It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society . . . As a corollary, the Court has altered its traditional rules of standing to permit—in the First Amendment area—'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' Dombrowski v Pfister, 380 US, at 486, 14 L Ed 2d 22. Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to re-

frain from constitutionally protected speech or expression.

Such claims of facial overbreadth have been entertained in cases involving statutes which, by their terms, seek to regulate 'only spoken words.' In such cases, it has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes. Overbreadth attacks have also been allowed where the Court thought rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations. . . . Facial overbreadth claims have also been entertained where statutes, by their terms, purport to regulate the time, place and manner of expressive or communicative conduct, . . . and where such conduct has required official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights. . . .

> The consequence of our departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression. . . .

It is beyond question that motion picture films, books and magazines are a form of expression protected by the

First Amendment to the Constitution of the United States. *Erznozink v City of Jacksonville,* 422 US 205, (1975); *Kaplan v California,* 413 US 115, (1973) at pp 119-20; *Interstate Circuit v Dallas, supra;* at p 682; *Freedman v Maryland,* 380 US 51, (1965); *Roth v United States,* 354 US 476 (1957); *Joseph Burstyn, Inc. v Wilson,* 343 US 495 (1952). And it is equally beyond question that books, magazines or motion picture films are not subject to regulation where that regulation is grounded upon the substantive message conveyed—in the context of their sexual or erotic content—unless and until it is deemed to be obscene. *Miller* v *California,* 413 US 15 (1973); *Roth v United States, supra.*

In *Roth v United States, supra,* the basic question for decision was whether the publication and sale of obscene material, however defined, could be criminally punished in light of First Amendment guarantees. The court ruled that obscenity was not protected and stated:

> "However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.
>
> . . .
>
> The fundamental freedoms of speech and press have contributed greatly to the development and well being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must

be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press material which does not treat sex in a manner appealing to a prurient interest."

In *Miller v California, supra,* the court enunciated the test to be applied in judging whether a book, magazine or film is obscene and outside the purview of First Amendment protections:

> "State statutes designed to regulate obscene materials must be carefully limited. See Interstate Circuit, Inc. v Dallas, supra, 390 US at 682-685 (1968). As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, when taken as a whole, do not have serious literary, artistic, political, or scientific value."

The ordinances at issue regulate the establishment of "adult" motion picture theatres and bookstores in the City of Detroit and define the term "adult" in the context of the content of the expression intended to be offered for sale, display and/or exhibition on the premises. In purporting to regulate the establishment of said businesses in the City of Detroit, Sections 32.0007 of Ordinance 742-G and Section

5-2-1.2 of Ordinance No. 742-G omit entirely the standards for judging press materials to be obscene. Though "adult" is defined in terms of content, *i.e.,* the depiction or description of sexual conduct or anatomical area, this definition in no way approximates the test of obscenity as specified in *Miller v California, supra.* Indeed, petitioners concede that the ordinances in question sweep far beyond the permissible restraints on obscenity and thus, apply to press materials that are protected by the First Amendment. See *Erznoznik v City of Jacksonville, supra.* Page 22 of Petitioner's Brief reads, "Obscenity is not an issue in the case at bar."

Nevertheless, petitioners maintain that businesses intending to offer press materials for sale, display and/or exhibition may be prohibited from certain areas of the City of Detroit (which prohibition may be waived) even though the press materials intended to be sold or exhibited are not obscene and therefore, fully entitled to the protection of the First Amendment. Petitioners justify this contention on the grounds that the City of Detroit has a valid interest in protecting and preserving the residential areas of the city and the business districts which serve them.

This amounts to no more than an undifferentiated fear or apprehension which the court, in various contexts, rejected as a rationale for overcoming First Amendment rights. *Tinker v Des Moine Indep. School District Community School District,* 393 US 503 (1969); *Cohen v California,* 403 US 15 (1971), at p 23; *City of Chicago Police Dept. v Mosely,* 408 US 92 (1972), at pp 100-101. The City of Detroit may not, consistent with the First Amendment attempt to create a barrier, by means of ordinances of this nature, to the free flow of press materials to the public even though the press materials do not meet standards of acceptability or because of their presumed offensive

nature. *Organization for a Better Austin v Keefe*, 402 US 415 (1971) at pp 418-420; *Cohen v California, supra*, at p 21.

What the City of Detroit has done is to create a third category of speech, protected but subject to regulation. Yet in the context of the substantive message it conveys, either speech is fully protected or it is not protected at all. *Cohen v California, supra.* This court has never countenanced any other alternative; it should not do so in the case at bar, for if as a rationale for shutting off discourse, speech of a sexual nature is said to be disquieting and not conducive to the continued stability of a neighborhood, it is but a step—in the name of preserving the tranquility and stability of any ethnic or religious area—to permitting the state to shut off speech disquieting to that area. And it is but a step to similar restrictions on bookstores or movie theatres selling or exhibiting other controversial types of books or films. The regulation of "motorcycle" movies could be justified by fear of motorcyclists disturbing the neighborhood, "youth cult" movies by fear of long-haired young people entering the neighborhood, filming depicting excessive violence by the fear that they might induce violence and crime, "black-exploitation" films, especially in white neighborhoods, because of racially stimulated fears.

The ordinances define the press materials in terms substantially more restrictive than the definition of obscenity. Petitioners concede they sweep far beyond these permissible restraints on obscenity, and as such, are clearly capable of reaching press materials which are not subject to state regulation. The regulations, by their . . . plain terms [are] not easily susceptible to a narrowing construction . . . " And, " . . . particularly where as here . . [Petitioners] . . . offer several distinct justifications for the

ordinance[s] in . . . [their] . . . broadest terms, there is no reason to assume that the ordinance[s] can or will be decisively narrowed." *Erznoznik v City of Jacksonville, supra,* at p 217. Since the ordinances, as written, sweep within their purview that which may not be regulated under the First and Fourteenth Amendments to the Constitution of the United States, they are void for overbreadth and should be invalidated on their face.

II.

ORDINANCE NOS. 742-G AND 743-G OF THE ORDINANCES OF THE CITY OF DETROIT ARE UNCONSTITUTIONAL AS WRITTEN AND/OR APPLIED IN THAT SAME FAIL TO MEET THE REQUISITES OF PROCEDURAL DUE PROCESS AND CONSTITUTE AN UNLAWFUL PRIOR RESTRAINT UPON THE EXERCISE OF RESPONDENT'S RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Section 66.0000 of Ordinance 742-G of the Official Zoning Ordinance of the City of Detroit establishes a prohibition to an additional business defined as a "regulated use" by the ordinance where there are two existing regulated uses within 1,000 feet of the proposed use defined as a regulated use. Pursuant to Section 66.0101, this prohibition may be waived by the City Plan Commission if the following findings are made by that administrative body: (App G, p 68)

> "a) That the proposed use will not be contrary to the public interest or injurious to nearby properties, and that the spirit and intent of this Ordinance will be observed.
>
> b) That the proposed use will not enlarge or encourage the development of a 'skid row' area.

c) That the establishment of an additional regulated use in the area will not be contrary to any program of neighborhood conservation nor will it interfere with any program of urban renewal.

d) That all applicable regulations of this Ordinance will be observed."

However, Section 66.0103 states that the City Plan Commission shall not consider such a waiver of locational requirements specified in Section 66.0000 until a petition has been filed with that administrative body which has been signed—and which signatures have been verified by a separate and additional administrative procedure through the Department of Building and Safety Engineering of the City of Detroit and the Detroit Police Department—by 51% of those persons owning, residing or doing business within 500 feet of the proposed location. (Section 66.0103 of Ordinance No. 742-G, as amended by Ordinance No. 891-G; App11, pp 87-88)

The Nortown Theatre, subsequent to the enactment of the ordinances in question, "qualified" as a "regulated use", as defined in the ordinances, by allegedly changing the nature of the motion picture films exhibited on the premises, which premises had been built and continually used as a motion picture theatre for approximately 30 years. Since the Nortown Theatre was within 1,000 feet of several other "regulated uses" and within 500 feet of a residential area (Petitioner's Brief, p 5), all of the regulatory provisions of Ordinance 742-G were required to be met by respondent. Since respondent was deemed an "adult" theatre, if it met the requisites of 742-G, respondent was then required to obtain a license, pursuant to Ordinance 743-G, from the mayor of the City of Detroit. Section 5-2-3 specifies the standards to be applied by the chief executive officer of the city: (App H, p 82)

> "The Mayor may refuse to issue a license for the operation of any business regulated by this article, and may revoke any license already issued upon proof submitted to him of the violation by an applicant, or licensee, his agent or employee, within the preceding two years, of any criminal statute of the State, or of any ordinance of this city regulating, controlling or in any way relating to the construction, use or operation of any of the establishments included in this article which evidences a flagrant disregard for the safety or welfare of either the patrons, employees, or persons residing or doing business nearby."

Thus, prior to exhibiting films defined by the ordinances as "adult" and in order to conform to the requirements of the ordinances in question without subjecting itself or its employees to criminal or civil sanction, the respondent was required to:

1. Obtain a petition from the Department of Building and Safety Engineering of the City of Detroit.

2. Obtain the signatures of 51% of those persons owning, residing, or doing business within 500 feet of the location of the Nortown Theatre.

3. Have the signatures thereon validated by the appropriate administrative agency of the city.

4. Present the petition and, as a nonconforming use, request a waiver from the City Plan Commission in accordance with Section 66.0101.

5. The findings having been made in accordance with sub-sections (a) through (d) of Section 66.0101, and if a

waiver is obtained from the City Plan Commission, obtain an "adult theatre license" from the mayor of the city.

6. If a waiver is not granted by the City Plan Commission, appeal that determination to the Board of Zoning Appeals whereat the applicant has the burden of overturning the findings and ruling of the City Plan Commission.

7. If the applicant is not successful before the Board of Zoning Appeals, the applicant may submit the matter to judicial review by filing an action for Writ of Superintending Control in the Circuit Court for Wayne County, Michigan, the court of general jurisdiction in the state. Michigan Constitution (1963), Art. VI, §28.

This procedure as outlined above, constitutes a prior restraint upon the exercise of respondent's rights under the First and Fourteenth Amendments of the Constitution of the United States in that the procedure established by the ordinances in question fail to meet even the most minimal requirements of procedural due process, for at each step the burden is borne by the proposed bookstore or theatre; at no point is a time limitation established within which the administrative procedure is to take place; the standards to be applied by the administrative agencies are so fraught with vagueness as to be virtually non-existent; and judicial review is neither prompt, nor assured and indeed, may be deemed to be rendered inoperative.

Though prior restraints are not unconstitutional *per se* *Southeastern Promotions, Ltd. v Conrad, supra; Bantam Books, Inc. v Sullivan,* 372 US 58, at p 70, Note #10 (1963), as this court said in *Southeastern Promotions, Ltd. v Conrad, supra,* at pp 558-60:

> "Any system of prior restraint, however 'comes to this Court bearing a heavy presumption against its constitutional validity.' . . . The presumption against prior restraint is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable . . . .
>
> In order to be held lawful, respondents' action, first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints, and second, it must have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech . . . .
>
> The settled rule is that a system of prior restraint 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.' Freedman v Maryland, 380 US 51, 58 . . . In Freedman, the Court struck down a scheme for the licensing of motion pictures, holding 'that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint.' 380 US, at 58, 13 L Ed 2d 649. We held in Freedman, and we reaffirm here, that a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards. *First,* the burden of instituting judicial

proceeding, and of proving that the material is unprotected, must rest on the censor. *Second,* any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third,* a prompt final judicial determination must be assured."

Thus, any system of prior restraint which does not establish, by its terms, the criteria enunciated in *Southeastern Promotions, Ltd., supra* and *Freedman v Maryland,* 380 US 51 (1965), fails to meet the requirements of the Procedural Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and is void. Clearly, these criteria are applicable, for though the thrust of the ordinances is addressed to regulating bookstores or motion picture theatres exhibiting materials of a specific nature rather than the materials *per se,* it is of no legal consequence that the censor did its work by placing a burden upon the establishment of such a business selling or exhibiting those materials through the use of the city's zoning and/or licensing authority rather than censoring the materials themselves, for the effect is the same; by denying a person the right to establish and operate a book store or a motion picture theatre or the right to an existing theatre or bookstore to exhibit "adult" press materials through the use of the city's zoning and licensing powers the ordinances effectively place an undue and restrictive burden upon the exercise of First Amendment rights. Thus, the assertion by the City of Detroit of its authority under its zoning and licensing powers to prohibit and/or regulate the establishment and/or operation of businesses selling or exhibiting materials of a particular nature and of a specific sexual content and thereby to prohibit and/or regulate the right to exhibit or disseminate materials presumptively protected under the First Amendment is the essence of this censorship scheme.

Petitioners' answer that the requisites of procedural use process enunciated in *Freedman, supra* and reiterated in *Southeastern Promotions, Ltd., supra,* are not applicable to the ordinances in question on the theory that it is the proposed theatre or bookstore, not the press materials *per se,* which are regulated is logically untenable and constitutionally irrelevant, for, as the court said in *Southeastern Promotions, Ltd. v Conrad, supra:*

> "Respondents' action here is indistinguishable in its censoring effect from the official actions consistently identified as prior restraints in a long line of this Court's decisions . . . In these cases, the plaintiffs asked the courts to provide relief where public officials had forbidden the plaintiffs the use of public places to say what they wanted to say. The restraints took a variety of forms, with officials exercising control over different kinds of public places under the authority of particular statutes. All, however, had this in common: *they gave public officials the power to deny use of a forum in advance of actual expression.*" (Emphasis added.)

The court then went on:

> "The elements of prior restraint identified in Cantwell and other cases were clearly present in the system by which the Chattanooga Board regulated the use of its theater. One seeking to use a theater was required to apply to the Board. The Board was empowered to determine whether the applicant should be granted permission—in effect, a license

> or permit—on the basis of its review of the content of the proposed production. Approval of the application depended upon the Board's affirmative action. Approval was not a matter of routine; instead, it involved the 'appraisal of facts, the exercise of judgment, and the formation of an opinion' by the Board."

Most, if not all, of the same elements of prior restraint identified by the court in *Southeastern Promotions, Ltd., supra,* exist in the system created by the City of Detroit to regulate the establishment and use of theatres and bookstores in the city by means of the ordinances in question, for, "One seeking to use a theatre . . . [to exhibit 'adult' films] . . . was required to apply to the . . . [City Plan Commission] . . . the . . . [City Plan Commission] . . . was empowered to determine whether the applicant should be granted permission—in effect a license or permit—on the basis of its review of the content of the . . . [press materials proposed to be exhibited on the premises] . . . approval of the applicant depended upon the . . . [City Plan Commission's] . . . affirmative action. Approval was not a matter of routine; instead, it involved the 'appraisal' of facts, the exercise of judgment, and the formation of an opinion by the . . . [City Plan Commission] . . . " Nor is the thrust of the regulatory ordinances at issue grounded upon an established exception to the doctrine of prior restraint. *Southeastern Promotions, Ltd. v Conrad, supra,* at pp 555-56.

The burden of going forward is placed upon the applicant at every step of the administrative procedure; *Lafayette Market and Sales Company v City of Detroit,* 43 Mich App 129 (1971). After exhaustion of the Administrative procedure, an aggrieved party may seek review in the

Circuit Court under General Court Rule (1963) 711 by filing a complaint for Writ of Superintending Control in order to implement the superintending or supervisory control power of the court over inferior tribunals. However, the reviewing court is limited to a determination as to whether a decision by an administrative agency is supported by competent material and substantial evidence.

Michigan Constitution (1963), Art. VI § 28

"Administrative action, review

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licences, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. . . . "

Thus, on appeal, review is limited to the question of whether or not the administrative board acted arbitrarily or abused its discretion. *Indian Village Manor Co. v Detroit,* 5 Mich App 679 (1967).

In *Mazo v City of Detroit,* 9 Mich App 354 (1968), the Court of Appeals held that a finding by the Common Council of the City of Detroit—acting as a zoning board of appeals—was "supported by competent, material and substantial evidence on the whole record." Absent a finding of an abuse of discretion the court was prevented from overriding the decision of the Common Council. What was

at issue in this matter, was *inter alia,* the application of the same "regulated use" ordinance which is now before the Court, and specifically the regulation prohibiting the establishment of more than two businesses defined as "regulated uses" within 1,000 feet of another. The court said at pp 364-365:

> "Section 10-1D is a 'skid row' ordinance whose object is to prevent neighborhood deterioration and whose validity no one contests. Mr. Elmer Mueller, head city planner, testified that it was the city's object to minimize the problems created by the congestion of liquor bars in a neighborhood. The city may legitimately use its ordinance to improve the condition of a neighborhood by refusing to authorize new nonconforming uses. Austin v Adler (1938), 283 Mich 667. This decision lay within the discretion of the common council.
>
> For plaintiff to have obtained a valid approval it was essential by the terms of the ordinance, section 10-1D quoted *supra,* that she obtain a waiver from the common council.
>
> We cannot agree with the trial court that the common council abused its discretion. The council is vested with authority to grant waiver after recommendation by the city plan commission and upon making a specified finding. In voting to deny plaintiff's petition, the council followed the recommendation of the city plan commission and found that the conditions that would justify waiver were not satisfied. The plan commission's finding was made after a graphic presentation by its staff, after plaintiff's counsel argued her case, and after testimony was taken in favor of and in opposition to plaintiff's

> proposed establishment of a bar. That a majority of those in the neighborhood surveyed in April, 1966 by the Detroit police department approved of the bar's establishment was not conclusive; that majority could not bind the plan commission or the city council. The findings were 'supported by competent, material and substantial evidence on the whole record.' Const 1963, art 6, § 28. The constitutional requirement was satisfied.
>
> The trial judge inspected the premises and the surrounding area, and he formed the opinion that the conditions that would support a waiver under the ordinance were satisfied in this case. However, absent a proper finding of an abuse of discretion, the trial court cannot override the decision of the common council. . . .'
>
> Therefore, though an applicant may seek judicial review of an adverse finding, the scope of review is limited to a finding that the administrative agency made a decision upon competent material and substantial evidence and unless the court finds that the administrative agency abused its discretion its ruling must stand. Thus, the burden imposed upon an applicant, once judicial review is instituted, is qualitatively greater and of a different nature than a burden usually imposed upon a litigant. The effect of the application of Michigan law in the case at bar and in the context of the regulatory ordinances at issue is to effectively deny judicial review of any meaning and of any substance.

Speiser v Randall, 357 US 513, (1958) at pp 520-529:

> "When we deal with the complex of strands in the web of freedoms which make up free speech, the

operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied.

. . . The procedures by which the facts of a case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights . . . the state . . . must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights—rights which we value most highly and which are essential to the workings of a free society. Moreover, since only considerations of the greatest urgency can justify restrictions on speech, and since the validity of a restraint on speech in each case depends on careful analysis of the particular circumstances . . . the procedures by which the facts of the case are adjudicated are of special importance and the validity of the restraint may turn on the safeguards which they afford.

. . .

The principal feature of the California procedure . . . is that the appellants as taxpayers under state law, have the affirmative burden of proof . . . the question for decision therefore, is whether this allocation of the burden of proof on an issue concerning freedom of speech, falls short of the requirements of due process.

. . .

Where the transcedent value of speech is involved, due process certainly requires in the circumstances

of this case that the state bear the burden of persuasion to show that appellants engaged in criminal speech. Kingsley Books, Inc. v Brown, 354 US 436, 1 L Ed 2d 1469. The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the state must bear those burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied . . . provide but shifting sands on which the litigant must maintain his position. . . . We hold that when the constitutional right to speak is sought to be deterred by a state . . . due process demands that the speech be unencumbered until the state comes forward with sufficient proof to justify its inhibition."

This constitutional defect is compounded by the fact that the guidelines to be applied by the administrative agency are vague and ambiguous.

If we start with the premise that precision of regulation must be the touchstone, *Interstate Circuit v Dallas, supra,* at p 682, these guidelines fail to meet even the most minimal requirements necessary to avoid the vice of vagueness. As this court said in *Interstate Circuit v Dallas, supra,* at pp 684-685:

> " . . . '[i]t does not follow that the Constituion requires absolute freedom to exhibit every motion picture of every kind at all times and all places'

> What does follow at the least . . . , is that the restrictions imposed cannot be so vague as to set 'the censor . . . adrift upon a boundless sea . . . , ' In short, as Justice Frankfurter said, 'legislation must not be so vague, the language so loose, as to leave to those who have to apply it too wide a discretion . . . , ' Kingsley Int'l Pictures Corp. v Regents, 360 US, at 694, 3 L Ed 2d at 1520 (concurring in result), one reason being that 'where licensing is rested, in the first instance, in an administrative agency, the available judicial review is in effect rendered inoperative [by vagueness].' Joseph Burstyn, Inc. v. Wilson, supra, at 532, 96 L Ed at 1121 (concurring opinion)."

The words of Justice Frankfurter, concurring in *Joseph Burstyn, Inc. v Wilson,* 343 US 495 (1951) at p 532, are particularly relevant and applicable to the case at bar:

> " . . . Prohibition through words that fail to convey what it permitted and what is prohibited for want of appropriate objective standards, offends Due Process in two ways. First, it does not sufficiently apprise those bent on obedience of law of what may reasonably be foreseen to be found illicit by the law-enforcing authority, whether court or jury or administrative agency. Secondly, where licensing is rested, in the first instance, in an administrative agency, the available judicial review is in effect rendered inoperative. On the basis of such a portmanteau word as 'sacrilegious,' the judiciary has no standards with which to judge the validity of administrative action which necessarily involves, at least in large measure, subjective determinations. Thus, the administrative first step becomes the last step."

If the applicant is able to sustain his burden of proof, Section 66.0101 specifies that the City Plan Commission may waive the locational prohibition. (App G, p 68) Section 31.0000(b) of the Official Zoning Ordinance of the City of Detroit (Ordinance No. 390-G) defines this term as follows:

> "The word 'shall' is always mandatory and not discretionary. The word 'may' is permissive."

Thus, even if the applicant is able to meet the burden of proof before the City Plan Commission, that administrative board is nevertheless empowered with the discretion to grant or deny a waiver of the locational provisions.

There is nothing in the ordinances which specify a time limitation within which to determine whether the applicant has qualified under Section 66.0103, nor is there a time limitation to which the City Plan Commission must conform under Section 66.0101. No statutory procedure exists which will insure a prompt judicial decision of a denial of a license nor is there a statutory procedure which would insure a prompt administrative decision from the Department of Building and Safety Engineering or the City Plan Commission. (It should be noted that in *Mazo v City of Detroit, supra,* the only reported case in Michigan pertaining to the "regulated use" ordinance, a petition for waiver was filed on October 19, 1966 and, after a decision from the City Plan Commission and hearing before the City Council, the petition was denied on January 24, 1967. The Circuit Court granted the property owner relief and the City of Detroit appealed. The Court of Appeals reversed on February 26, 1968. The administrative procedure thus took over three months and the judicial proceedings approximately one year. It should also be noted that the Court of

Appeals held, even though a survey of the neighborhood was conducted—a procedure identical to the one required by Section 66.0103 of Ordinance #742-G and even though a majority of those in the neighborhood approved of the proposed use—the City Plan Commission and the City Council was not bound by that approval, at p 364. Thus, the petition requirement—though not binding—is an additional requisite wherein the applicant for the proposed use must, of necessity, spend additional time meeting same.)

This particular system of restraint is enforced by threat of both criminal and civil sanction.

Section 69.0000 of the official Zoning Ordinance of the City of Detroit specifies that a violation of same shall subject the violator, upon conviction to a fine of not more than $500.00 or to imprisonment for no more than 90 days and further specifies that each day that a violation continues shall constitute a separate offense. MCLA §125.587 permits a court, upon a finding that a use is nonconforming in that it is violative of a municipal zoning ordinance, to be deemed a nuisance *per se* and subject to immediate abatement.

The delay and uncertainty inherent in the procedural process created by the ordinances in question would have the effect of discouraging a theatre or bookstore operator from offering for sale or exhibiton press materials of an alleged "adult" nature on the premises. The City of Detroit, " . . . [can] . . . not escape the obligation to afford appropirate procedural safeguards." The provisions of ordinances do not "assure prompt judicial review with a minimal restriction of First Amendment rights necessary under the circumstances," *Southeastern Promotions, Ltd. v Conrad, supra,* and as such, the system of prior restraint at bar, having failed to meet the minimal appropriate and

necessary procedural safeguards consistent with First Amendment rights, is an unconstitutional prior restraint upon respondent's rights under the First and Fourteenth Amendments to the Constitution of the United States.

III.

ORDINANCE NOS. 742-G AND 743-G OF THE ORDINANCES OF THE CITY OF DETROIT, AS SAME PURPORT TO REGULATE THE ESTABLISHMENT OF "ADULT" BUSINESSES IN THE CITY OF DETROIT, ARE VIOLATIVE OF THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND REPUGNANT TO THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, AS WRITTEN AND/OR AS APPLIED, IN THAT, BY THEIR TERMS, THE STATUTORY CLASSIFICATION IS GROUNDED UPON THE CONTENT OF THE MATERIALS AND FURTHER, SAID STATUTORY CLASSIFICATION IS NOT RATIONALLY RELATED TO A VALID PUBLIC PURPOSE NOR NECESSARY TO THE ACHIEVEMENT OF A COMPELLING STATE INTEREST.

The ordinances in question are zoning ordinances. However, assuming an area of the city is zoned for general business purposes, these ordinances place a selective burden upon certain kinds of businesses ostensibly because as Section 66.0000 of Ordinance No. 742-G states, certain businesses have "serious objectionable operational characteristics," and thereby have a "deleterious effect upon adjacent areas", which contribute to the blighting or downgrading, "of the surrounding neighborhood." These businesses are classified as "regulated uses" and more than two such uses within 1,000 feet of one another are prohibited. Those uses include "adult" bookstores and motion picture theatres—as defined in said ordinance—Class "D" cabarets, hotels, motels, bars, shoeshine parlors, etc. Thus, it follows that

if a bar is down the block; if a motel is across the street; if a barbershop has a shoeshine parlor, then the proposed establishment of a bookstore or a motion picture theatre intending to sell or exhibit "adult" materials is prohibited from opening without first meeting the requirements of Section 66.0101 and pursuant thereto, obtaining a waiver of the locational restriction from the City Plan Commission.

Having classified certain kinds of book stores and motion picture theatres as "regulated uses," Ordinance No. 742-G places an additional burden upon the establishment of adult bookstores, adult motion picture theatres, adult mini motion picture theatres and Class "D" cabarets. Section 66.0103 requires the submission of a petition signed by 51% of those person sowning, residing or doing business within 500 feet of the proposed location before the poribition against the establishment of an adult bookstore, adult motion picture theatre, adult mini motion picture theatre or Group "D" cabaret within 1,000 feet of another, "regulated use" may be waived by the City Plan Commission. Thus, having classified so called "adult" businesses as "regulated uses" and prohibited more than two within 1,000 feet of another without the approval of the City Plan Commission, Section 66.0103 of Ordinance No. 742-G, in effect, creates a sub-category within a category, for of those classified as regulated uses, only adult bookstores, adult motion picture theatres, adult mini motion picture theatres and Class "D" cabarets need obtain the consent of 51% of those persons owning, residing or doing business within 500 feet of the proposed location.

Generally, the United States Supreme Court has recognized that a state has the power to treat different classes of persons in differnt ways, however, the Equal Protection

Clause of the Fourteenth Amendment denies the states the power to classify arbitrarily but must be reasonable and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.

Eisenstadt v Baird, 405 US 438 (1972)
Reed v Reed, 404 US 71 (1971)

In *Dunn v Blumenstein*, 405 US 330 (1972), the United States Supreme Court struck down Tennessee's durational voting residency requirements as violative of the Equal Protection Clause of the Fourteenth Amendment. In so doing, the court restated the classic formulation of the test to be applied where an ordinance or statute is attacked as repugnant to the Equal Protection Clause:

> "To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification. Cf. Williams v Rhodes, 398 US 23, 30, 21 L Ed 2d 24, 31, 89 S Ct 5 (1968). In considering laws challenged under the Equal Protection Clause, this Court has evolved more than one test, depending upon the interest involved. First, then we must determine what standard of review is appropriate.
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> . . .
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> . . . durational residence laws must be measured by a strict equal protection test: they are unconstitutional unless the State can demonstrate that such laws are '*necessary* to promote a *compelling* governmental interest.' Shapiro v Thompson, supra, at 634, 22 L Ed 2d at 615 (first emphasis added):

Kramer v Union Free School District, 395 US at 627, 23 L Ed 2d at 589. Thus phrased, the constitutional question may sound like a matehematical formula. But legal 'tests' do not have the precision of mathematical formulas. The key words emphasize a matter of degree: that a heavy burden of justification is on the State, and that the statute will be closely scrutinized in light of its asserted purposes.

It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means that unnecessarily burden or resrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision', NAACP v Button, 371 US 415, 538, 9 L Ed 2d 405, 421, 83 S Ct 328 (1963); United States v Robel, 389 US 258, 265, 19 L Ed 2d 508, 514, 88 S Ct 419 (1967), and must be 'tailored' to serve their legitimate objectives. Shapiro v Thompson, supra, at 631, 22 L Ed 2d at 613, And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'"

And in *Eisenstadt v Baird, supra,* at Note #7:

> " . . . Of course, if we were to conclude that the Massachusetts statute impinges upon fundamental freedoms under Griswold, the statutory classification would have to be not merely rationally related to a valid public purpose but necessary to the achievement of a compelling state interest. . . .

Taking the formulation enunciated in *Dunn v Blumenstein, supra,* the nature of the classification and the interests so affected relate directly to the exercise of First Amendment rights, for the single distinction between those businesses which fall within the regulatory purview of Ordinance No. 742-G and those which do not—and indeed, those businesses which must meet the additional burden imposed by Section 66.0103 as well as the burden imposed by Section 66.0000—is the content of the press materials intended to be sold or exhibited on the premises of the proposed business. By placing such a burden upon the establishment of a bookstore or motion picture theatre, said ordinances directly affect those who wish to operate such a business and further, effectively regulate the public's access to presumptively protected press materials.

Petitioners would argue that a bookstore or a movie theatre is a business like any other business establishment and should therefore be treated no differently than any other retail establishment. However, the ordinances at issue discriminate among bookstores and theatres solely on the basis of the content of the books, periodicals and films intended to be sold or exhibited on the premises. Furthermore, it would be specious to argue that a book or motion picture film is protected expression under the First and Fourteenth Amendments to the Constitution of the United States but the place where books are sold or films are exhibited is not protected. The censor would have little difficulty in restricting the public's access to newspapers by taxing the printing press upon which the newspaper was printed if the First Amendment was given such a narrow scope. *Near v Minnesota, supra.* Indeed, the court has recognized that the setting of a bookstore or commercial theatre falls within the umbrella of First Amendment protec-

tions. *Roaden v Kentucky,* 413 US 496 (1973) at p 504, for a bookstore or a theatre bears a necessary relationship to the freedom to distribute information or opinion, *Schneider v State,* 308 U.S. 149 (1939) at p 161; books cannot be sold without a store established for that purpose and films cannot be shown without a building within which to exhibit them. *Grayned v City of Rockford, supra,* at p 235, Note #47; *Cameron v Johnson,* 390 US 611 (1968), at 617.

Thus, since the ordinances affect a fundamental right, they are unconstituional unless the state can demonstrate that these ordinances are necessary to promote a compelling governmental interest, and further, that the regulatory scheme chosen is the least drastic among reasonable ways to achieve its objectives. *Dunn v Blumenstein, supra; Shelton v Tucker,* 364 US 478; *Village of Belle Terre v Boraas,* 416 US 1, (1974), Justice Marshall, dissenting opinion, at p 18.

Petitioners maintain that businesses intending to offer press materials for sale, display and/or exhibition may be prohibited from certain areas of the City of Detroit (which prohibition may be waived) even though the press materials intended to be sold or exhibited are not obscene and therefore, fully entitled to the protection of the First Amendment, and justify this contention on the grounds that the City of Detroit has a valid interest in protecting and preserving the residential areas of the city and the business districts which serve them. Petitioners' Brief, at pp 15 and 29, states the rationale for the regulations in question:

> "The city is attempting . . .to regulate the location of those businesses which, when clustered together or located immediately adjacent to residential

> areas, are not conducive to the stability of the neighborhood, but rather create an atmosphere which drives away potential residents and merchants, adversely affects the living conditions in the neighborhood, forces a decline in property values and a resulting exodus of the residents and businessmen, and contributes to the general deterioration of the business districts and the surrounding residential neighborhoods which they serve.
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> The need to provide a suitable atmosphere for family living and a suitable atmosphere to raise children, to avoid blight and decay of neighborhoods, to conserve property values, and to attract rather than dispel concerned citizens willing to maintain their neighborhoods, is compelling justification, for the regulations imposed by the City of Detroit."

These regulatory ordinances were originally adopted in 1962 when certain businesses, liquor establishments, hotels, motels, and pool halls among others, were classified as "regulated uses" upon a finding that the "skid row" atmosphere which existed in parts of Detroit was created in large part by a concentration of similar types of businesses which were not oriented to serve the needs of the immediate neighborhood but primarily attracted persons from without the surrounding community who add little or no concern for the maintenance of a viable neighborhood. To prevent the establishment of a skid row in other areas of the city creating a similar situation resulting in blight and police problems, the regulated use ordinance, prohibiting the establishment of more than two "regulated uses" within 1,000 feet of another, was enacted. In doing so, substantial reliance was placed upon testimony of Dr.

Mel Ravitz, a sociologist and former president of the Common Council of the City of Detroit, who pointed out the concept of the self-fulfilling prophecy and its importance to the stability of a residential neighborhood:

> " . . . if people believe something is true, evn if it is not originally, they will tend to act as if it were true, and in so doing, help produce the condition that originally was only believed; that if residents of any neighborhood believe that the concentration of the proscribed uses damage the neighborhood, they will act as if it were true, and will seek to move away and allow people with different standards to move in. They will allow their property to decline, and will not engage in the full range of activities necessary to the maintenance of a healthful residential neighborhood." (Petitioners' Brief, p 19).

Approximately ten years later "adult" businesses were added to the list of "regulated uses" in order to

> " . . . avoid a resurgence of the skid row . . . to protect the property values of the surrounding businesses and residences, and to maintain confidence in and stability of the neighborhoods." (Petitioners' Brief, pp 19-20).

The interest asserted by Petitioners to justify the ordinances at issue, appears to be the right of privacy of adjoining home owners and businessmen in the sense that an "adult" business is an intrusion upon the rights of those families and businesses allegedly because it contributes to the deterioration of a neighborhood. (Petitioners' brief, pp 35-36). In pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling

viewers or auditors, the Court said just last term, in *Erznoznik v City of Jacksonville, supra,* at pp 208-211:

> "Such cases demand delicate balancing because
>
> > '[i]n th[e] sphere of collision between claims of privacy and those of [free speech or] free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society.' Cox Broadcasting Corp. v Cohn, 420 US 469, 491, 43 L Ed 2d 328, 95 S Ct 1025 (1975).
>
> Although each case ultimately must depend on its own specific facts, some general principles have emerged. A State or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content. . . . But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power. . . . Such selective restrictions have been upheld only when the speaker intrudes on the privacy of the home, see Rowan v Post Office Dept., 397 US 728, 25 L Ed 2d 736, 90 S Ct 1484 (1970), or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure. See Lehman v City of Shaker Heights, supra. As Mr. Justice Harlan cautioned:
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> > 'The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable man-

ner. Any broader view of this authority would effectively employ a majority to silence dissidents simply as a matter of personal predilections.' Cohen v California, 403 US, at 21, 29 L Ed 2d 284, 91 S Ct 1780.

The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, 'we are inescapably captive audiences for many purposes.' Rowan v Post Office Dept., 397 US, at 736, 25 L Ed 2d 736, 90 S Ct 1484. Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent the narrow circumstances decribed above, the burden normally falls upon the viewer to 'avoid further bombardment of [his] eyes.' Cohen v California, 403 US, at 21, 29 L Ed 2d 284, 91 S Ct 1780."

However, the alleged intrusive behavior is not the speech itself, for the regulatory thrust of the ordinances is triggered by the content of the expression *intended* to be sold or exhibited, not what is sold or exhibited. Thus, there is no unwilling auditor or viewer and by definition, no captive audience. Therefore,

> "We are not concerned in this case with a properly drawn zoning ordinance restricting the location of . . . theatres or with a nondiscriminatory nuisance ordinance designed to protect the privacy of persons in their homes from the visual and audible intrusions of such theatres." *Erznoznik v City of Jacksonville, supra,* Note #9.

The homeowner's right of privacy is not invaded in any manner. To the contrary, the "intrusion" in the case at bar is grounded upon what those within the neighborhood *believe* will be the alleged detriment to the neighborhood, for it is those people within a specified area of the proposed use which must grant their approval and it is an administrative agency which, in acting on behalf of the residents and residential area involved, must then make a finding that the proposed use will not be a detriment to the surrounding neighborhood. These ordinances thus grant authority which would, " . . . effectively employ a majority to silence dissidents simply as a matter of personal predilections." *Cohen v California,* 403 US, at p 21. However, a community may not, consistent with the First Amendment, wall itself off from speech which, directly or indirectly, is presumed to be offensive to that community. See *Organization for a Better Austin v Keefe,* 402 US 15 (1971) at pp 418-420.

Petitioners also assert that the ordinances in question are justified on the basis of the City of Detroit's undoubted interest in protecting minors. However, this interest is asserted in the context of the purpose and intent of all zoning oridnances " . . . of providing a suitable atmosphere for family living, and a suitable atmosphere to raise children." Again, as was said in *Erznoznik v City of Jacksonville, supra,* at pp 212-214:

> " . . . a . . . municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults . . . nevertheless minors are entitled to a significant measure

> of First Amendment protection . . . and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.
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> • • •
>
> . . . Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors."

Raising children in a suitable atmosphere, though undoubtedly a salutory purpose, could in no way justify restricting access of the general public to press materials protected under the First Amendment. As this court said in *Butler v Michigan,* 352 US 380 (1957):

> "The state insists that by . . . quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely this is to burn the house to roast the pig.
>
> • • •
>
> We have before us legislation not reasonably to restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children.

What is left, then, is the rationale for the regulatory ordinances found at pp 22-23 of Petitioners' Brief:

> "Even though there is now no question that pornography may be banned, there remains the very real problem of controlling the influx of adult businesses whose stock in trade, whether films, magazines or performances, are entitled to display and/or distribution before any judgment may be made as to whether the material offered is pornographic. In addition, unless and until the courts rule that the use of an establishment to exhibit or sell obscene press materials or films is abateable as a nuisance, continued and repeated convictions for disseminating pornographic material will not close those business establishments which are the continuing, visible sources of material which is offensive to the neighborhood business and residential community whether or not the material has been legally determined to be pornagraphic. Experience has shown that one or more convictions against an establishment does not force its closure, nor does it offer any protection to the neighborhood.

At the hearing on motions for summary judgment on September 17, 1973, before District Court Judges Cornelia G. Kennedy and Lawrence Gubow, defense counsel stated, in response to various questions from the court: (App. L., pp 47-50)

> *"Mrs. Reilly:*
>
> " . . . What we have tried to do in enacting these new regulations is to avoid an adverse affect [sic] on our neighborhoods, an adverse affect [sic] we see time and time again recurring. We know now that the Court has said that any material which is proven to be obscene may be entirely prohibited;

and yet we must be realistic and face facts. It is only after such movies as 'Deep Throat' are actually found to be obscene that they may be prohibited. Until that time, when there is a Trial on the merits and a decision, a final decision, that material may be disseminated at random and at the will of the person who is operating the theatre or the book store. . . . The fact is that if we do not in some way control the dissemination of what we describe as adult material, it can and it has adversely affected our neighborhoods. And the City must take some kind of action. It cannot sit back and wait until this material is finally determined to be obscene or not."

• • •

• • • we know that until these kinds of magazines are taken to Court one by one on a piecemeal basis, there is no way that we can stop the sale or dissemination of this kind of material.

Judge Gubow:

Doesn't that lend credence to the argument that you are here atempting to do indirectly what you cannot do directly through the obscenity statute?

Mrs. Reilly:

. . . It is true we cannot do indirectly what we want to do directly if we are not in compliance with the law. But what the Court said, the U.S. Supreme Court, in the Miller and Paris Adult Theatre case, is that when we are dealing with commercialization in sex, it is a whole new ballgame. And if the City is faced with the actual fact that these kind of bus-

inesses are offering what is truly described as adult material and that adult material is being sold from a business in a commercial enterprise in such a way that it affects the neighborhoods, taking those books piece by piece to court under the obscenity laws is not going to close down the business. . . . if 'Deep Throat' is cited under a criminal statute and is found to be in violation of the obscenity laws, the owner of the store may be fined or he may be sentenced to jail for a few months; but that does not stop the operation of the business . . .

Judge Kennedy:

What you are saying is that the criminal laws don't preserve the neighborhood.

Mrs. Reillys

That's right your Honor. Thank you. She said it in a nutshell."

Thus, since a bookstore or theatre, once established, cannot be removed from the neighborhood, notwithstanding that its stock in trade is "adult" material, the city is seeking to prevent the establishment of such bookstores and theatres by means of these ordinances. In the name of "preservation of the neighborhood" the ordinances in question are intended to prevent the establishment and operation of business establishments, ". . . which are the continuing visible sources of material which is offensive to the neighboring business and residential community . . ."

The effect of the ordinances is to prevent the establishment of new bookstores and theatres selling or exhibiting materials which are presumptively protected by the First

Amendment and to deter existing theatres and bookstores from offering for sale or exhibition press materials which have never been found to be obscene by a prior judicial adversary hearing on that issue, *Marcus v Search Warrant,* 367 US 717 (1961); *A Quantity of Books v Kansas,* 378 US 205 (1964), and therefore are entitled to the full protections of the First Amendment. The City of Detroit is in effect, using the sledgehammer in an area which this court has said requires the most sensitive of tools. *Speiser v Randall,* 357 US 513 (1958). The ordinances operate to suppress, on the basis of past experience, i.e., established bookstores and theatres of an assumed "similar" nature, the distribution of press materials presumptively protected by the First Amendment and is thus a classic example of a prior restraint. *Near v Minnesota,* 283 US 697 (1931); *Organization for a Better Austin v Keefe, supra.*

The rationale of the Petitioners is plainly untenable for at most it amounts to no more than the argument rejected by the Court in *Police Dept. of the City of Chicago v Mosely, supra,* that a certain kind of picketing—that which was prohibited—was more prone to produce violence than another kind of picketing:

> "Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter. Freedom of expression, and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis. '[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.'

> Tinker v Des Moines School District, 393 US, at 508, 21 L Ed 2d at 739 . . ."

Contrary to Petitioners' assertion, it is of no legal consequence that respondent operates a commercial enterprise.

> *Smith v California, supra,* at 150:
>
> "It is . . . no matter that the dissemination [of books] takes place under commercial auspices . . . Certainly a retail book seller plays a most significant role in the process of the distribution of books."
>
> *Ginzburg v United States,* 383 US 463 (1966) at p 474,
>
> "No weight is ascribed to the fact that petitioners have profited from the sale of publications . . . to sanction consideration of this fact might indeed induce self-censorship, and offend the frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment."

And see *New York Times Co* v *Sullivan,* 376 US 254 (1964), at p 266.

Nor is it constitutionally relevant that respondent may operate a theatre in another area of the City of Detroit. In *Southeastern Promotions Ltd v Conrad, supra,* at p 556, the court said:

> "Whether petitioner might have used some other, privately owned, theater in the city for the production is of no consequence. There is reason to doubt on this record whether any other facility would have served as well as these, since none apparently had the seating capacity, accoustical features, stage

> equipment and electrical service that the show required. Even if a privately owned forum had been available, that fact alone would not justify an otherwise impermissible prior restraint. '[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' Schneider v State, supra, 308 US, at 163 84 L Ed 155."

Finally, Petitioners' rationale that the ordinances operate to merely regulate the establishment of bookstores and theatres of the nature defined by the ordinances not suppress them, is of no legal consequence in the context of First Amendment rights. *Southeastern Promotions Ltd v Conrad, supra,* Note # 8:

> "Also important, though unessential to our conclusion, are the classificatory aspects of the Board's decision. A licensing system need not affect total suppression in order to create a prior restraint. In Interstate Circuit v Dallas, 390 US 676, 688, 20 L Ed 2d 225, 88 S Ct 1298 (1968), it was observed that the evils attendant on prior restraint 'are not rendered less objectionable because the regulation of expression is one of classification rather than direct suppression.' In that case, the Court held that a prior restraint was created by a system whereby an administrative board in Texas classified films as 'suitable for young persons' or 'not suitable for young persons.' The 'not suitable' films were not suppressed, but exhibitors were required to have special licenses and advertise their classification in order to show them. Similarly, in Bantam Books, Inc. v Sullivan, 372 US 58, 9 L Ed 2d 584, 83 S Ct 631 (1963), the Court held that a system of 'informal censorship' working by exhortation and advice sufficiently inhibited expression to constitute a prior restraint and warrant injunctive relief. There, the Court held unconstitutional a system in which a commission was charged with reviewing material 'manifestly tending to the corruption of the youth'; it did not have direct regulatory or suppressing functions, but operated by persuasion and intimidation, and these informal methods were found effective.
>
> In the present case, the Board classified the musical as unfit for showing in municipal facilities. It did not make a point of publicizing its finding that 'Hair' was not in the 'best interest' of the public, but the classification stood as a warning to all concerned, private theater owners and general public alike. There is little in the record to indicate the extent to which the Board's action may have affected petitioner's ability to obtain a theater and attract an audience. The Board's classification, whatever the magnitude of its effect, was not unlike that in Interstate Circuit and Bantam Books."

The City of Detroit ". . . acting as a censor [has] . . . undertake[n] selectively to shield the public from some kinds of speech on the ground that they are more effesive than others . . . [in such a situation] the First Amendment strictly limits its power." *Erznoznik v City of Jacksonville, supra.* The city's basic premise, upon which these ordinances are grounded, would support restrictions upon virtually any kind of press materials of a controversial nature. such considerations cannot, under the First Amendment, justify the sweeping effect of these ordinances.

Each of the additional problems mentioned in Petitioners' Brief and supporting affidavits, i.e., increase in street crimes, prostitution and dope peddling, illegal parking, obscene materials in the possession of children, can be regulated by criminal statutes and ordinances already in force. Indeed these ordinances are designed to obviate the necessity of resorting to the criminal law. That the city's interest in preserving the neighborhoods from decay is made that much more difficult is but one more instance of the price we must pay for our freedoms. "The power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe on the protected freedoms." *Cantwell v Connecticut,* 310 US 296 (1941). "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v Tucker,* 364 US 479 (1960).

In the present case, the overly broad means employed by the ordinances at issue infringe upon and prohibit the exercise of First Amendment rights. Petitioners have presented no clear and convicing evidence of the existence of the alleged evils or that the ordinances are the most limited means available to reach such evil, and have thus failed to meet their burden of demonstrating the need for these broad remedies.

We are thus left with an ordinance which classifies those motion picture theatres and bookstores which fall within its regulatory purview and those which do not on the basis of the content of the press materials intended to be sold and/or exhibited. "The operative distinction is . . ." the image on the screen. "But above all else, the First Amendment means that government has no power to restrict ex-

pression, because of its message, its ideas, its subject matter or its content." *Police Dept. of Chicago v Mosley, supra,* at p. 95.

It cannot be logically argued that there is any qualitative difference between the message on a picket sign as in *Mosley, supra,* and the words in a book or the image on a screen, and if it is a violation of the Equal Protection Clause to prohibit all picketing within 150 fet of a school except where a labor dispute was involved, it is also a violation of the Equal Protection Clause to allow any book store or motion picture theatre on any street zoned for those uses but to prohibit more than two "regulated uses" within 1,000 feet of another and to require some regulated uses to met the additional burden of Section 66.0103, based upon the content of the materials intended to be sold or exhibited on the premises. This is the essence of the holding of the Sixth Circuit Court of Appeals (App A, pp 26-28) from which the Supreme Court of the United States granted certiorari. There is no reason to overrule that decision.

IV.

ORDINANCE NOS. 742-G AND 743-G, OF THE ORDINANCES OF THE CITY OF DETROIT, INSOFAR AS SAME PURPORT TO REGULATE THE ESTABLISHMENT OF MOTION PICTURE THEATRES IN THE CITY OF DETROIT, ARE REPUGNANT TO THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN THAT SAME, BY THEIR TERMS, PLACE A FORBIDDEN BURDEN UPON THE EXERCISE OF THE RIGHT OF FREE SPEECH IN THAT SAID ORDINANCES REGULATE THE EXPRESSION ABSENT ANY VALID AND/OR RECOGNIZABLE COMPELLING STATE INTEREST AND/OR IF THERE EXISTS A COMPELLING STATE INTEREST WHICH IS LEGITIMATE AND SUBSTANTIAL IN REGULATING MOTION PICTURE THEATRES IN THE CITY OF DETROIT, SAME ARE VOID FOR IMPERMISSIBLE OVERBREADTH BY EMPLOYING MEANS WHICH SWEEP UNNECESSARILY BROADLY AND THEREFORE INVADE THE AREA OF PROTECTED FREEDOMS.

It is axiomatic that any restraint or burden imposed upon a constiitutionality protected medium of expression comes into court bearing a heavy presumption *against* its constitutionality.

Freedman v State of Maryland, supra
Bantam Books, Inc. v Sullivan, supra

Subject to certain limited exceptions, any statute or ordinance which subjects communication or the mode thereof to governmental regulation infringes upon the right of free speech, imposes a prior restraint upon the enjoyment of First Amendment freedoms, and places a forbidden burden upon the exercise of liberty protected by the Federal Constitution.

N.A.A.C.P. v Button, 371 US 415 (1963)

"The decisions of this court have consistently held that only a compelling state interest in the regulation of a subject within the state's constitutional power to regulate can justify limiting First Amendment freedoms."

Bates v Little Rock, 361 US 516 (1960)

"Where there is a significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest interest which is compelling."

Thus, any interest—whatever its nature—which competes with freedom of speech must come equipped with clear and convincing evidence that its claims for supremacy are urgent, substantial, and relevant.

N.A.A.C.P. v. Alabama, 357 US 449 (1958)
Thomas v Collins, 323 US 516 (1944)
Talley v California, 362 US 60 (1960)
Lovell v Griffin, 303 US 444 (1937)

These constitutional requisites are no less applicable to municipal zoning ordinances where, under the guise of economic and social legislation, fundamental rights are impinged. Unlike the circumstance in *Village of Belle Terre* v *Boraas*, 416 US 1 (1974), the zoning ordinances in question were aimed directly at a fundamental constitutional right. Freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive and the right to read. *Griswold* v *Connecticut*, 381 US 479 (1965), at pp 482-483. The very purpose and intent of the zoning ordinances in question is to regulate the establishment of new "regulated uses", (a "regulated use" in the context of an "adult" bookstore or theatre is defined in terms of the substantive message of the books, periodicals or films intended to be sold or exhibited and

therefore applies to proposed bookstores and theatres in addition to existing bookstores and theatres wishing to sell or exhibit "adult" press materials). Allegedly because adult boodstores and theatres have "serious objectionable operational characteristics which have a "deleterious effect upon adjacent areas." If, "the state may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Griswold* v *Connecticut, supra,* it may not, by means of a zoning ordinance, restrict the right to distribute and the right to receive by restricting the means by which books, magazines or films are distributed to, and received by, the public, particularly where, as here, a theatre or bookstore bears a necessary relationship to that aspect of free speech and press. *Schneider v State, supra.*

Petitioners assert that the zoning ordinances are aimed at the conduct of the business, not the press materials which it intends to disseminate, and premise their argument on the test enunciated by this Court in *United States v O'Brien*, 391 US 367 (1968). However, the ordinances themselves emphasize the word "adult", and that is defined on the basis of the content of the materials intended to be disseminated on the premises. Indeed, as Petitioners have said, the ordinances are intended to regulate businesses, ". . . which are the continuing visible sources of material which is offensive to the neighboring business and residential community." (Petitioners' Brief p 23). Thus, these zoning regulations cannot be justified as a regulation of conduct where the "conduct" is the expression itself.

As Chief Justice Warren stated in *United States v O'Brien, supra,* at p 382, and as the Sixth Circuit Court of Appeals reiterated: (App A, p 24)

> "The case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful. In Stromberg v California, 283 US 359 (1931), for example, this Court struck down a statutory phrase which punished people who expressed their 'opposition to organized government' by displaying 'any flag, badge, banner, or device.' Since the statute there was aimed at suppressing communication it could not be sustained as a regulation of noncommunicative conduct." See also, NLRB v Fruit & Vegetable Packers Union, 377 US 58, 79 (1964) (concurring opinion)."

In *Cohen v California,* 403 US 15 (1971), this Court struck down appellant Cohen's conviction under a statute wherein he was charged and found guilty of "offensive conduct." The Court said at pp 18-19:

> "The conviction quite clearly rests upon the asserted offensiveness of the *words* Cohen used to convey his message to the public. The only 'conduct' which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon 'speech.' cf. Stromberg v California, 283 US 359, 75 L Ed 1117, 51 S Ct 532, 73 ALR 1484 (1931), not upon any separately identifiable conduct which allegedly was intended by Cohen to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message and hence arguably could be regulated without effectively repressing Cohen's ability to express himself. Cf. United

States v O'Brien, 391 US 367, 20 L Ed 2d 672, 88 S Ct 1673 (1968).

• • •

Appellant's conviction, then, rests squarely upon his exercise of the 'freedom of speech' protected from arbitrary governmental interference by the Constitution and can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the substantive message it conveys. . . ."

And see, *Near v Minnesota, supra.*

It is the " . . . Communication allegedly integral to the conduct . . . [which] . . . is itself thought to be harmful, for it is the *use* as defined in Section 32.0007, which is purportedly recognized as having serious objectionable operational characteristics; and the use is defined in terms of the content of the press materials disseminated. Since the ordinances, ". . . are aimed at . . . communication . . . [they] . . . cannot be sustained as a regulation of noncommunicative conduct." As the operational distinction between motion picture theatres and bookstores which fall within the regulatory purview of the ordinances and those which do not is the subtsantive message of the book or motion picture intended to be sold or exhibited on the premises, "The only conduct which the state sought to . . . [restrict] . . . is the fact of communication." The ordinances in question must therefore be justified as a regulation of expression *per se.*

The Supreme Court has established the power of the state to regulate or prohibit certain forms of expression merely upon a showing that such a form was employed. For example, the State may validly prohibit obscene ma-

terial. Yet, if this was the purpose or intent of the ordinances they must necessarily fail as being void for impermissible overbreadth, for the ordinances, by their terms, define the materials exhibited at "adult" establishments by the specific sexual conduct or the specific anatomical content depicted therein, and not in terms of that which is defined as obscene. *Miller v California, supra.*

Nor can it conceivably be argued that the content of the materials, as defined, would be inherently likely to provoke violent reaction. *Chaplinsky v New Hampshire,* 315 US 568 (1942).

Finally, the state has the power to prohibit intrustion into the privacy of another. Yet, because of the nature of a theatre, there logically could be no unwilling or unsuspecting viewers, nor, would the presumed presence of an unwilling individual justify curtailing all speech capable of giving offense. Finally, whereas the state may prohibit intrusions into the privacy of the home, the Supreme Court has often stressed that we are often captives outside the sanctuary of the home and subject to objectionable speech. *Erznoznik v City of Jacksonville, supra.*

In *Cohen v California, supra,* the United States Supreme Court, per Justice Harlan, spoke at some length on the interest of the state in the area of First Amendment rights where that which the state regulated was the content of the material *per se:*

> " . . . this case cannot be said to fall within those relatively few categories of instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed. This is not,

for example, an obscenity case. Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. Roth v United States, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957). . . .

"This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called 'fighting words,' those personally abusive *epithets* which, when addressed to the ordinary citizens are, as a matter of common knowledge, inherently likely to provoke violent reaction. Chaplinsky v New Hampshire, 315 U.S. 568, 86 L. Ed. 1031, 62 S. Ct. 766 (1942). . . .

"Finally, in arguments before this Court much has been made of the claim that Cohen's distateful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest. Of course, the mere presumed presence of unwilling listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. See, e.g., Organization for a Better Austin v Keefe, — U.S. — , 29 L. Ed. 2d 1, 91 S. Ct. — (1971). While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, e.g., Rowan v Postmaster General, 397 U.S. 728, 25 L. Ed. 2d 636, 90 S. Ct. 1484 (1970), we

have at the same time consistently stressed that 'we are often "captives" outside the sanctuary of the home and subject to objectionable speech.' *Id.*, at 738, 25 L. Ed. 2d at 744. The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections."

The form of expression in the case at bar is not subject to regulation since it is conceded that the zoning ordinances extend far beyond the permissible restraints on obscenity. They can be justified, if at all, only as a valid regulation of the manner in which freedom of speech is exercised, not as a permissible restriction on the substantive message intended to be conveyed. *Cohen v California, supra,* at pp 19-24. However, the zoning ordinance itself describes that which is subject to regulation not in terms of time, place and manner, but in terms of subject matter. This points up the fact that the zoning ordinances reach far beyond time, place and manner to restrictions on expression. *Cox v Louisiana,* 379 US 536, 556 (1965), Note #14; *Police Dept. of the City of Chicago v Mosely, supra,* at p 99.

The operation and effect of the ordinance is clear; their purpose is to regulate a form of expression which is not constitutionally subject to regulation; they are related to and aimed at the restriction and suppression of free expression, the effect of which is the essence of censorship.

Assuming *arguendo* that a legitimate governmental interest does exist, the means adopted by these zoning regulations in pursuit of that end restrict the exercise of free speech and press in a manner far greater than is necessary to the furtherance of that interest. In *Police Dept. of the City of Chicago v Mosely, supra,* at 101, Note #8, this Court said:

> "In a variety of contexts we have said that 'even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' Shelton v Tucker, 364 US 479, 488, . . . This standard, of course, has been carefully applied when First Amendment interests are involved. E.g., Schneider v State, 308 US 147, 164. . . . "

Contrary to Petitioners' assertion, the effect of the zoning ordinances on free speech and press is not incidental but is immediate, direct and stifling.

The method by which the city has attempted to regulate "adult" businesses is a two step procedure. First, the applicant must obtain the approval of 51% of those persons owning, residing, or doing business within a radius of 500 feet of the proposed use by circulating a petition in that area. (Section 66.0103 of Ordinance No. 742-G, as amended by Ordinance No. 891-G; App I, pp 87-88.) Second, having obtained the requisite number of signatures and same having been verified, if more than two regulated uses are within 1,000 feet of the proposed use, a prohibition to an additional regulated use exists which may be waived by the City Plan Commission upon certain findings being made by that administrative body. (Section 66.0101 of Ordinance

No. 742-G; App G, p 68). These provisions would apply to a theatre or bookstore intending to sell or exhibit "adult" material which wishes to open in a certain area of the city. They would also apply to an existing theatre or bookstore which wishes to relocate down the street, or one desiring to expand next door. Indeed, as the use is defined in terms of the content of the press materials, they would apply to an existing theatre or bookstore which wishes to exhibit or sell press materials defined as "adult"—the factual circumstance now before the court regarding the Nortown Theatre.

The first prong of the procedure, that an applicant must seek and obtain the approval of a majority of persons owning, residing or doing business within a given area of the proposed location, is the very antithesis of the Free Speech and Press provisions of the Constitution, for it subjects the exercise of free speech to the will of the majority and has the effect of allowing discourse to be shut off simply as a matter of personal predilection. It would have the effect of permitting the majority to decide what will be heard and where, on the assumption that the content of the expression its disquieting or annoying. It would permit exactly that which the First Amendment was intended to prohibit for if the First Amendment has any meaning, it is that all ideas—whether they be unorthodox, controversial or even hateful to the prevailing climate of opinion—have the full protection of the guarantees of the First Amendment.

Cohen v California, supra, at pp 23-25
Organization for a Better Austin v Keefe, supra
Edwards v South Carolina, 372 US 229 (1963), at pp 237-238
Terminiello v Chicago, 337 US 1 (1948) at p 4.

The second prong of the procedure established by the regulatory ordinances subjects the applicant of a proposed or existing theatre or bookstore, to an administrative procedure wherein the applicant is required to bear the burden of establishing criteria which are inherently vague before he will be permitted to engage in conduct which is concededly protected by the First Amendment.

The theatre or bookstore operator is required to state his future intent. However, it would be virtually impossible for him to know in advance what books will be printed or what films will be produced and indeed, what kind of press materials will be made available to him. He is therefore faced with a Hobson's Choice. He either limits himself to the innocuous and non-controversial or, in order to give himself the widest possible latitude in offering press materials to the public, and rather than run the risk of finding himself in the position of running afoul of criminal or civil sanction, or both, he may feel compelled to comply with the ordinances in question. His choice is then to act as his own censor or to subject himself to regulations which are inherently vague and a procedure which is fraught with delay and uncertainty. The precarious position of the bookstore or theatre operator becomes even more evident when one considers the nature of the threat of criminal and/or civil sanction.

The official Zoning Ordinance of the City of Detroit specifies that a violation of same shall subject the violator, upon conviction to a fine of not more than $500.00 or to imprisonment for no more than 90 days and further specifies that each day that a violation continues shall constitute a separate offense.

Section 69.0000:

"Any person, firm, or corporation, or anyone acting in behalf of said person, firm, or corporation, violating any provisions of this Ordinance shall, upon conviction, be subject to a fine of not more than five hundred dollars for each offense or to imprisonment in the Detroit House of Correction for a period of not more than ninety (90) days or to both such fine and imprisonment in the discretion of the court. Each day that a violation is continued shall constitute a separate offense. In the case of firms or associations, the penalty may be imposed upon the partners or members thereof, and in the case of corporations, upon the officers thereof."

In addition, the applicable statutes of the State of Michigan permit a building, upon a finding that the use to which it is put is in violation of a municipal zoning ordinance, to be deemed a nuisance *per se* and to be abated forthwith.

M.C.L.A., §125.587:

Violation nuisance per se; abatement.

"Buildings erected, altered, razed or converted, or uses carried on in violation of any provision of local ordinances or regulations made under the authority of this act are hereby declared to be a nuisance per se. The court shall order such nuisance abated and the owner and/or agent in charge of such building or land shall be adjudged guilty of maintaining a nuisance per . . ."

The coercive impact of the threat of these sections is obvious: the single issue in either a criminal or civil proceeding (or both) is whether the bookstore or theatre is,

or is not, "adult." Since the only question is whether the use is "adult," strict or absolute criminal and/or civil responsibility is imposed by the operation of these sanctions, for the question is not whether the theatre or bookstore operator *knowingly* operated an adult bookstore or theatre but merely whether he did, in fact, operate an adult bookstore or theatre. In *Smith v California, supra,* this court struck down an obscenity ordinance which imposed strict criminal responsibility on the grounds that the elimination of the scienter requirement may tend to work a substantial restriction on free speech and press. The strict liability features, the court held, would tend seriously to have the effect of restricting the public's access to books which are not obscene, and said:

> " . . . By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. . . . And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded."

Having dispensed with any requirement of guilty knowledge, the effect of these zoning ordinances would certainly be no different than that envisioned by the court in *Smith v California, supra.* Indeed, the effect would be even more comprehensive and stifling than that envisioned in *Smith, supra,* for the issue is whether the press materials sold or exhibited at the bookstore or theatre is "adult", not whether it is obscene.

These zoning ordinances are applicable to, and have a substantial effect upon, not only the so-called "adult" bookstore or theatre—whatever that term may mean—but to virtually every existing bookstore, theatre and even the corner drug store. It is not difficult to imagine, as this Court said in *Interstate Circuit v Dallas, supra,* "the vast wasteland that some have described in reference to another medium might be a verdant paradise in comparison", to the publishing or motion picture industry. In the name of conservation of business and residential property values, and preservation of neighborhood stability, see *Schneider v State,* 308 US 147 (1939), discourse would be shut off, debate would be stilled and the most basic and most fundamental of our rights would be irrevocably weakened.

V.

SECTION 5-2-1.2 OF THE CODE OF THE CITY OF DETROIT, AS SAME PERTAINS TO THE ISSUANCE OF A LICENSE TO OPERATE AN "ADULT" MOTION PICTURE THEATRE, IS REPUGNANT TO THE FIRST, FOURTH, FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AS WRITTEN AND/OR AS APPLIED IN THAT THE STANDARDS ENUMERATED THEREIN ARE VAGUE AND AMBIGUOUS AND THUS TOTALLY INCAPABLE OF OBJECTIVE MEASUREMENT, THERBY VESTING THE MAYOR OF THE CITY OF DETROIT WITH VIRTUALLY UNLIMITED DISCRETIONARY POWER TO GRANT OR REFUSE A LICENSE, AND EFFECTIVELY IMPOSES A PRIOR RESTRAINT UPON THE EXERCISE OF FIRST AMENDMENT RIGHTS.

Section 5-2-1.1 of the Code of the City of Detroit provides that it is unlawful to operate any business regulated by said ordinance without first obtaining a license. Section 5-2-3 gives the Mayor of the City of Detroit the authority to grant or refuse such a license. Section 5-2-3 reads:

> "The Mayor may refuse to issue a license for the operation of any business regulated by this article, and may revoke any license already issued upon proof submitted to him of the violation by an applicant, or licensee, his agent or employee, within the preceding two years, of any criminal statute of the State, or of any ordinance of this city regulating, controlling or in any way relating to the construction, use or operation of any of the establishments included in this article which evidences a flagrant disregard for the safety or welfare of either the patrons, employees, or persons residing or doing business nearby." (App H, p 82)

Because of the total lack of criteria and/or because of the vague and ambiguous nature of the criteria, enumerated therein, Section 5-2-3 fails to meet the minimal requirements of the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, and as such, said provision is void and unenforceable.

In considering the constitutionality of licensing ordinances touching upon First Amendment freedoms, "precision of regulation must be the touchstone."

Interstate Circuit, Inc v Dallas, supra
N.A.A.C.P. v Button, 371 US 415.

Ordinances were struck down which provided that a permit could be granted for the distribution of religious publications if the city official deemed it "proper and advisable," or where the cause for which the applicant desired to solicit was "religious." *Largent v Texas*, 318 US 418 (1942) and *Cantwell v Connecticut*, 310 US 296 (1939). Ordinances were similarly held unconstitutional where no standards whatsoever were set forth to circumscribe the discretion of officials in granting or denying licenses.

Kunz v New York, 340 US 290 (1951)
Saia v New York, 334 US 558 (1947)
Lovell v Griffin, 303 US 444 (1937)
Niemotko v Maryland, 340 US 268 (1951)

In *Burton v Municipal Court of Los Angeles*, 68 Cal Rptr 721, 441 P 2d 281, the California Supreme Court said:

> "Examination of the ordinance involved in the instant case . . . undeniably reveals that it does not provide precise standards capable of objective measurement—the sensitive tools to be employed when-

ever First Amendment rights are involved . . . Section 103.29 (6) empowers the board to refuse a permit . . . (to engage in the business of exhibiting motion picture films to the public in any theatre for compensation) . . . if the applicant is 'unfit to be trusted with the privileges granted by such permit, or has a bad moral character, intemperate habits or a bad reputation for truth, honesty or integrity'. Such overly broad standards are fraught with the hazard that an applicant will be denied his rights to free speech and press through exercise of the power of the board, in its discretion, to refuse a permit because of the content of the films which the applicant exhibits in his theatre. For example, the board may consider than an applicant who has exhibited films offensive to the sensibilities of board members does not have 'good moral character' or is 'unfit to be trusted'. The same danger lurks in the board's discretionary power to refuse the permit if in its opinion the 'general welfare of the public' and its 'good morals' would not justify the issuance. Thus sections 103.29 (b) and 103.31 (c) 1 are unconstitutional as applied to petitioners in that they vest city officials with virtually unlimited discretionary power to grant or refuse permits and to impose a censorship or previous restraint upon constitutional rights."

In *Staub v City of Baxley*, 355 US 313 (1958), the court stated at p 322:

> "It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms."

A cursory reading of the above provision would indicate that it fails to meet even the most minimal requirement and thus, constitutes a prior restraint upon the exercise of First Amendment rights and violates due process of law. How does one determine whether the violation of an ordinance or statute evidences a flagrant disregard for the safety or welfare of the patrons, employees or persons residing or doing business nearby? And in what context does the ordinance address itself? Does this refer to building code violations or violations pertaining to moral terpitude, and in any case, how is such a violation of the law related to the proposed business and the issuance of a license therefor? Standards like these are virtually incapable of measurement. And where no standards exist upon which to premise the grant or denial of a license, said provision is clearly void.

CONCLUSION

Whatever the label given to the ordinances at issue, whether designated zoning, licensing or penal in nature, their purpose, intent, operation and effect is to regulate and suppress free expression contrary to the First and Fourteenth Amendments to the Constitution of the United States. They are an unconstitutional abridgement of free speech and press.

The decision of the Sixth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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